

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SERGIO RODRIGUEZ,	)	Civil No. 11-1216-IEG(WVG)
	)	
Petitioner,	)	REPORT AND RECOMMENDATION
	)	DENYING PETITION FOR WRIT
v.	)	OF HABEAS CORPUS
	)	
B.M. CASH, Warden,	)	
	)	
Respondent.	)	
	)	
_____	)	

**I. INTRODUCTION**

Sergio Rodriguez (hereafter "Petitioner"), a state prisoner proceeding *pro se* has filed a Petition for a Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. Petitioner challenges his San Diego County Superior Court convictions of first degree murder and gun use and discharge. (Respondent's Lodgment No. 1, CT 239-42, 246-47.)<sup>1/</sup> He was sentenced to two consecutive indeterminate terms of twenty five years to life imprisonment. (CT 199-200, 249-50.) Petitioner alleges his conviction and imprisonment violates the

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<sup>1/</sup> As used herein, "CT" and "RT" refer to the Clerk's Transcript and the Reporter's Transcript, from the California Superior Court trial, Respondent's Lodgment Nos. 1 and 2, respectively.

1 Fifth and Fourteenth Amendments as interpreted in Griffin v.  
2 California, 380 U.S. 609 (1965).

3 Respondent B.M. Cash (hereafter "Respondent") asserts that  
4 habeas corpus relief is not available because the judgment did not  
5 result in a violation of Petitioner's federal constitutional rights,  
6 and that the absences of a violation of the U.S. Constitution  
7 compels the denial of relief.

8 Based upon a review of the pleadings, documents, and evidence  
9 presented in this case, and for the reasons set forth below, the  
10 Court **RECOMMENDS** that the Petition be **DENIED**.

## 11 **II. STATEMENT OF FACTS**

12 This Statement of Facts is taken substantially from the  
13 California Court of Appeal unpublished opinion, People v. Rodriguez,  
14 case No. D054633 (Respondent's Lodgment No. 6, at 2-4). The Court  
15 relies on these facts under 28 U.S.C. § 2254(e)(1). See Park v.  
16 Raley, 506 U.S. 20, 35-36 (1992) (holding findings of historical  
17 fact, including inferences properly drawn from such facts, are  
18 entitled to statutory presumption of correctness).

19 In July 2007, Petitioner, wearing a San Diego Padres jersey,  
20 and friend Fernando Gomez separately drove to Wild Woolly's bar in  
21 Chula Vista, California. As the two consumed beers at the bar,  
22 Petitioner commented that another person (Andrew Hicks), sitting at  
23 a nearby table, was looking at him. Petitioner then aggressively  
24 approached Hicks, yelling and cursing at him. Two bar security  
25 guards who witnessed the confrontation reported Hicks was not  
26 aggressive in response to Petitioner. One of the guards pulled  
27 Petitioner away and admonished him to calm down. Petitioner then  
28 offered to shake Hicks' hand, but Hicks refused. The same guard

1 asked Petitioner to stay away from Hicks. Petitioner complied by  
2 moving to another end of the bar where he socialized for a time  
3 before leaving with Gomez through the rear door.

4 After leaving the bar, Petitioner and Gomez drove in Gomez's  
5 car to purchase beer, then parked near the bar and stood outside  
6 drinking. Empty beer cans of the same size and brand purchased by  
7 Petitioner at the store were found at the scene. One of the cans  
8 had Petitioner's fingerprints on it and two other cans had Gomez's  
9 fingerprints on them. While Petitioner was drinking outside the  
10 bar, he used an expletive to refer to Hicks. Soon thereafter,  
11 Petitioner aggressively approached two men who walked out of the bar  
12 and began to fight with one of them. The two men then ran away from  
13 Petitioner.

14 Petitioner then walked to his car, retrieved a shotgun and  
15 returned with the shotgun tucked into his pants. At that time Hicks  
16 walked out of the bar, Petitioner pulled out the shotgun, and began  
17 striking Hicks with it. Hicks asked, "What did I do?" and grabbed  
18 the shotgun, but Petitioner freed it from Hick's hand, stepped back,  
19 aimed, and fired. Hicks fell to the ground and died from the  
20 gunshot wound, which hit him in the back on his upper right  
21 shoulder. Stippling around the wound was consistent with the  
22 shotgun being fired from a distance no greater than five to eight  
23 feet. The trajectory of the gunshot was consistent with Hicks  
24 ducking and turning away when he was struck.

25 A witness heard the gunshot and saw Petitioner hurriedly  
26 cross the street while trying to hide something in his pants.  
27 Petitioner tried to enter his own car but then ran to Gomez's car,  
28 saying he had lost his car keys. Petitioner told Gomez to drive him

1 home. Petitioner telephoned his mother on the way to his house and  
2 said, "Mom, I f—ed up." Before Gomez left Petitioner's house,  
3 Petitioner admonished him to keep his mouth shut. That night,  
4 Petitioner's sister wrote in her diary that her brother had killed  
5 someone.

6 Petitioner subsequently told two other witnesses that he had  
7 been in a fight. One witness saw Petitioner's mother trying to  
8 retrieve his car from the area of the murder. The day after the  
9 incident Petitioner told his girlfriend that he had shot someone.

10 Several weeks after the incident, the police arrested  
11 Petitioner and searched his house. During the search, they found a  
12 Padres jersey similar to the one Petitioner wore the night of the  
13 incident. The jersey was in the garage, inside a box under some  
14 newspaper. There were small white flakes consistent with shotgun  
15 shell buffer on the jersey, and similar to buffer material located  
16 at the murder scene. Although police did not find a shotgun, they  
17 did find a shotgun choke tool and shotgun cleaning materials in  
18 Petitioner's room.

### 19 **III. PROCEDURAL HISTORY**

20 On December 20, 2007, Petitioner was charge with premeditated  
21 and deliberate murder (Cal. Penal Code, §§ 187, 189; count 1), and  
22 robbery (Cal. Penal Code, § 211; count 2). It was alleged that in  
23 the commission of the murder, Petitioner intentionally and person-  
24 ally used and discharged a firearm proximately causing great bodily  
25 injury and death [Cal. Penal Code §§ 12022.53 (d), (c), (b),  
26 12022.5(a)]. Petitioner pled not guilty. (CT 215.)

1 On November 12, 2008, following a jury trial, Petitioner was  
2 found guilty of first degree murder and the firearm use and  
3 discharge allegations were found to be true. (CT 239-42, 246-47.)

4 On February 10, 2009, the trial court sentenced Petitioner to  
5 twenty five years to life imprisonment on the murder conviction and  
6 a consecutive term of twenty five years on the firearm discharge  
7 that caused great bodily injury and death. (CT 199-200, 249-50.)

8 On February 11, 2009, Petitioner filed a Notice of Appeal.  
9 (CT 201.) On December 8, 2009, the California Court of Appeal  
10 affirmed the judgment. (Respondent's Lodgment 6.)

11 Petitioner filed a Petition for Review in the California  
12 Supreme Court. (Respondent's Lodgment 7.) On February 18, 2010,  
13 the California Supreme Court denied review. (Respondent's Lodgment  
14 8.)

15 On May 18, 2011, Petitioner filed the Petition currently  
16 before the Court. Respondent filed an Answer. Petitioner filed a  
17 Traverse.

#### 18 **IV. PETITIONER'S CLAIM**

19 Petitioner raises one claim in his Petition. He contends his  
20 Fifth and Fourteenth Amendment rights were violated when the  
21 prosecution committed prejudicial misconduct during closing argument  
22 by commenting on Petitioner's failure to testify, in violation of  
23 Griffin v. California, 380 U.S. 609 (1965). The prosecutor's  
24 statements were as follows:

25 Search of his residence. A hidden jersey. Why is  
26 that a hidden jersey? Why didn't he tell us why  
27 Sergio Rodriguez hid that jersey? Why didn't we hear  
about that? Why is that jersey hidden in the garage in  
a box underneath newspaper?

28 [Griffin objection overruled.]

1 Ladies and gentlemen, I'm talking about, why didn't  
 2 counsel explain to us - he explained to us that that  
 3 jersey was in the garage, something about it not  
 4 having blood on it, and he didn't tell us why it was  
 5 in the garage.  
 6 (3 RT 683.)

#### 7 A. STANDARD OF REVIEW

##### 8 1. Scope of Review

9 Title 28, United States Code, § 2254(a), sets forth the  
 10 following scope of review for federal habeas corpus claims:

11 The Supreme Court, a Justice thereof, a circuit judge,  
 12 or a district court shall entertain an application for  
 13 a writ of habeas corpus in behalf of a person in custody  
 14 pursuant to the judgment of a State court only on the  
 15 ground that he is in custody in violation of the  
 16 Constitution or law or treaties of the United States.  
 17 28 U.S.C. § 2254(a) (2006) (emphasis added).

18 As amended, 28 U.S.C. § 2254(d) reads:

19 (d) An application for a writ of habeas corpus on  
 20 behalf of a person in custody pursuant to the judg-  
 21 ment of a State court shall not be granted with  
 22 respect to any claim that was adjudicated on the  
 23 merits in State court proceedings unless the adjudi-  
 24 cation of the claim -

25 (1) resulted in a decision that was contrary to, or  
 26 involved an unreasonable application of, clearly  
 27 established Federal law, as determined by the Su-  
 28 preme Court of the United States; or

(2) resulted in a decision that was based on an  
 unreasonable determination of the facts in light of  
 the evidence presented in the State court proceed-  
 ing.

28 U.S.C. § 2254(d)(1)-(2) (2006).

29 "[The Anti Terrorism and Effective Death Penalty Act]  
 30 establishes a 'highly deferential standard for evaluating state-court  
 31 rulings, which demands that state-court decisions be given the  
 32 benefit of the doubt.'" Womack v. Del Papa, 497 F.3d 998, 1001 (9th  
 33 Cir. 2007) (quoting Woodford v. Viscotti, 537 U.S. 19, 24 (2002)).  
 34 To obtain federal habeas relief, Petitioner must satisfy either

1 § 2254(d)(1) or § 2254(d)(2). See Williams v. Taylor, 529 U.S. 362,  
2 403 (2000). The Supreme Court interprets § 2254(d)(1) as follows:

3 Under the "contrary to" clause, a federal habeas  
4 court may grant the writ if the state court arrives  
5 at a conclusion opposite to that reached by this  
6 Court on a question of law or if the state court  
7 decides a case differently than this Court has on a  
8 set of materially indistinguishable facts. Under the  
9 "unreasonable application" clause, a federal habeas  
10 court may grant the writ if the state court identi-  
11 fies the correct governing legal principle from this  
12 Court's decisions but unreasonably applies that  
13 principle to the facts of the prisoner's case.  
14 Id. at 412-13; see also Lockyer v. Andrade, 538 U.S. 63,  
15 73-74 (2003).

16 Where there is no reasoned decision from the state's highest  
17 court, the Court "looks through" to the underlying appellate court  
18 decision. Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991). If the  
19 dispositive state court order does not "furnish a basis for its  
20 reasoning," federal habeas courts must conduct an independent review  
21 of the record to determine whether the state court's decision is  
22 contrary to, or an unreasonable application of, clearly established  
23 Supreme Court law. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir.  
24 2000) (overruled on other grounds by Lockyer, 538 U.S. at 75-76);  
25 accord Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). A state  
26 court, however, need not cite Supreme Court precedent when resolving  
27 a habeas corpus claim. Early v. Packer, 537 U.S. 3, 8 (2002). "[S]o  
28 long as neither the reasoning nor the result of the state-court  
decision contradicts [Supreme Court precedent,]" the state court  
decision will not be "contrary to" clearly established federal law.  
Id.

29 "A state court's determination that a claim lacks merit  
30 precludes federal habeas relief so long as 'fairminded jurists could  
31 disagree' on the correctness of the state court's decision."

1 Harrington v. Richter, 131 S.Ct. 770, 786 (2011). The Court observed  
 2 that the standard is difficult to meet "because it was meant to be."  
 3 Id. at 786.

#### 4 **V. DISCUSSION**

##### 5 **A. CLAIM ONE: Griffin Error**

6 Petitioner raised this claim in the California Court of  
 7 Appeal. The Court of Appeal concluded that the prosecutor's comments,  
 8 "viewed in context... can only be seen as a fair comment on the state  
 9 of the evidence, comment[s] falling outside the purview of Griffin,"  
 10 and "the trial court overruled defense counsel's Griffin error  
 11 objection because the prosecutor's question did not refer directly  
 12 or indirectly to Rodriguez's failure to testify." (Respondent's  
 13 Lodgment No. 6, at 7, 10.) The Court of Appeal addressed Peti-  
 14 tioner's arguments by examining the context in which the prosecutor's  
 15 comments were made, and found that the prosecutor did not ask the  
 16 jury to draw an adverse inference from Petitioner's silence, in  
 17 violation of Griffin. (Id. at 7.) The trial court's judgment was  
 18 affirmed. (Id. at 10.)

19 Petitioner then raised this claim in a Petition for Writ of  
 20 Habeas Corpus filed in the California Supreme Court. The Petition was  
 21 denied without a citation to authority or statement of reasoning.  
 22 (Respondent's Lodgment No. 8.) As there was no reasoned opinion  
 23 furnished by the California Supreme Court, this Court "looks through"  
 24 to the underlying appellate court decision. Ylst, 501 U.S. at  
 25 801-06.

##### 26 **1. Discussion**

27 The Fifth Amendment prohibits the prosecution from commenting  
 28 on a defendant's failure to testify by forbidding "either comment by



1 the prosecution on the accused's silence or instructions by the court  
 2 that such silence is evidence of guilt." Griffin, 380 U.S. at 615,  
 3 fn omitted. However, "courts will not reverse when the prosecutorial  
 4 comment is a single, isolated incident, does not stress an inference  
 5 of guilt from silence as a basis of conviction, and is followed by  
 6 curative instructions." Lincoln v. Sunn, 807 F.2d 805, 809 (9th Cir.  
 7 1987).<sup>2/</sup>

8 A prosecutor may comment on the defendant's failure to  
 9 present exculpatory evidence as long as the comments do not call  
 10 attention to the defendant's failure to testify. United States v.  
 11 Mares, 940 F.2d 455, 461 (9th Cir. 1991); United States v. Chan  
 12 Yu-Chong, 920 F.2d 594, 598 (9th Cir. 1990). Comments on the failure  
 13 of the defense, as opposed to the defendant, to counter or explain  
 14 the testimony presented are also permissible. Mares, 940 F.2d at  
 15 461; Chan Yu-Chong, 920 F.2d at 599; see also United States v.  
 16 Patterson, 819 F.2d 1495, 1506 (9th Cir. 1987)(comments only  
 17 indirectly referred to defendant's failure to testify). A prosecu-  
 18 tor's indirect comment violates Griffin only

19 if it is manifestly intended to call attention  
 20 to the defendant's failure to testify, or is of  
 21 such a character that the jury would naturally  
 and necessarily take it to be a comment on the  
 failure to testify.

22 Lincoln, 807 F.2d at 809.

23 Petitioner's claim does not succeed because the prosecutor  
 24 did not commit a Griffin error by directly or indirectly commenting  
 25 on Petitioner's failure to testify.

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28 <sup>2/</sup>The trial court did not offer a curative instruction here but none was  
 necessary given the prosecutor's comments and the context in which they were made.

1 During opening argument, the prosecutor discussed the  
2 evidence and specifically addressed Petitioner's Padres jersey and  
3 the location where it was found, arguing that it evidenced a  
4 consciousness of guilt:

5 And finally, the shirt worn on the night of the  
6 killing, that Padres shirt that we talked about.  
7 Well, he wears it in his DMV photo, apparently wears  
8 it when he goes out to a party, goes to a friend's  
9 house to drink. Why is it in the garage? Why is it in  
10 a box underneath a newspaper? Why is it hidden? It is  
11 because that's the one he wore on the night he  
12 murdered Andrew Hicks? Absolutely. Why isn't it  
13 hanging in his closet? Why isn't it laying on his bed  
14 with the rest of his clothes? It's in the closet- in  
15 the garage hidden under boxes, underneath this  
16 newspaper, hoping that nobody will find it.

(3 RT 616).

12 Petitioner's counsel, in his argument, scoffed at the  
13 assertion that the jersey was hidden or that its location suggested  
14 a consciousness of guilt. (3 RT 660-661).

15 During the prosecutor's opening argument, no mention was  
16 made, either directly or indirectly, of Petitioner's election to  
17 remain silent and not testify. The prosecutor legitimately drew the  
18 trier-of-fact's attention to the Padres jersey and its location when  
19 it was found. Petitioner's counsel, as expected, attempted to diffuse  
20 the damaging evidence and the reasonable inferences to be drawn from  
21 that evidence. Petitioner's counsel's closing argument invited the  
22 prosecutor's rebuttal comments which were an appropriate response  
23 thereto.

24 The prosecutor did not directly address Petitioner's failure  
25 to testify in his rebuttal comments. Preceding the comments to which  
26 Petitioner objects, the prosecutor stated: "So let's go over some of  
27 the things that (defense) counsel talked about." These words placed  
28 the prosecutor's subsequent comments in the proper context and must

1 be considered with them. Petitioner looks only to the "offending"  
2 argument in isolation without looking to what the prosecutor said  
3 before as well as afterward. In the question "why didn't he tell us,"  
4 the "he" refers to defense counsel, as evidenced by the words "why  
5 Sergio Rodriguez hid that jersey?" immediately following. (3 RT  
6 683.) The prosecutor's questioning of why defense counsel did not  
7 present exculpatory evidence or testimony to explain why the jersey  
8 was hidden is permissible under Mares. After the Griffin objection  
9 was overruled, the prosecutor again did not refer to Petitioner's  
10 refusal to testify, but asserted "I'm talking about, why didn't  
11 counsel explain to us..." (3 RT 683)(emphasis added). The use of  
12 the word "counsel" shows that the prosecutor was directing his  
13 comments to Petitioner's counsel's failure to rebut the evidence  
14 presented.

15 Furthermore, the prosecutor's indirect comments did not  
16 manifestly intend "to call attention to the defendant's failure to  
17 testify." Lincoln, 807 F.2d at 809. The question "[w]hy didn't he  
18 tell us why Sergio Rodriguez hid that jersey?" was used as a  
19 rhetorical device to call attention to the possibility that Peti-  
20 tioner hid the jersey, thereby showing Petitioner's consciousness of  
21 guilt. The prosecutor clearly used "he" to refer to defense  
22 counsel's failure to address the issue. (3 RT 683.) After the trial  
23 court overruled Petitioner's defense counsel's Griffin objection, the  
24 prosecutor stated "why didn't counsel explain to us... he didn't tell  
25 us why it [the jersey] was in the garage." (Id.) The prosecutor's  
26 comments reflect defense counsel's deficiency in addressing the  
27 issue, not an indirect attack on Petitioner's election not to  
28 testify. Also, the comments were not of "such a character that the

1 jury would naturally and necessarily take it to be a comment on the  
2 failure to testify" because of the prosecutor's use of the word  
3 "counsel." Lincoln, 807 F.2d at 809. The prosecutor's remarks were  
4 not used impermissibly as they did not convey a direct or indirect  
5 referral to Petitioner's failure to testify.

6 Based on an independent review of the record, the Court finds  
7 that the California Court of Appeal's and the California Supreme  
8 Court's denial of claim one was neither contrary to, nor an unreason-  
9 able application of, clearly established Supreme Court law. Greene,  
10 288 F.3d at 1089. Accordingly, the Court **RECOMMENDS** habeas relief  
11 be **DENIED** as to claim one.

#### 12 **VI. CONCLUSION AND RECOMMENDATION**

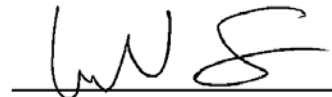
13 The Court submits this Report and Recommendation denying all  
14 claims in the Petition to United States District Judge Irma E.  
15 Gonzalez under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the  
16 United States District Court for the Southern District of California.  
17 For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the  
18 district court issue an Order (1) approving and adopting this Report  
19 and Recommendation and (2) directing that Judgment be entered denying  
20 the Petition.

21 **IT IS ORDERED** that no later than January 11, 2012, any party  
22 to this action may file written objections with the Court and serve  
23 a copy on all parties. The document should be captioned "Objections  
24 to Report and Recommendation."

25 **IT IS FURTHER ORDERED** that any reply to the objections shall  
26 be filed with the Court and served on all parties no later than  
27 January 27, 2012. The parties are advised that failure to file  
28

1 objections within the specified time may waive the right to raise  
2 those objections on appeal of the Court's order. See Turner v.  
3 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d  
4 1153, 1156 (9th Cir. 1991).

5  
6 DATED: December 12, 2011

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8 

Hon. William V. Gallo  
U.S. Magistrate Judge